LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 29 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965.

No. 629

IN THE MATTER OF THE APPLICATION
OF
KIMBERLY STEIN, a minor, by AUDREY H. STEIN, his parent and next friend, *et al.*,
Petitioners-Appellants,
against
ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York,
and
MAX J. RUBIN, *et al.*, constituting the Board of Education of the City of New York,
and
BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Defendants-Appellees.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

EDWARD J. BAZARIAN,
Attorney for Petitioners-Appellants,
39-01 Main Street,
Flushing, N. Y. 11354

THOMAS J. FORD,
Of Counsel.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—RE 2-6978—1965

Table of Contents.

	Page
Opinions Below	2
Jurisdiction of This Court	2
Questions Presented	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
The Facts	4
Reasons for Granting the Writ	7
1. The federal questions herein have not heretofore been specifically determined by this court	7
2. The Circuit Court of Appeals has decided those questions in a way which is not in accord with applicable decisions of this Court and is in conflict with the First and Fourteenth Amendments to the Constitution	8
3. The suppression of voluntary prayer in school by an administrative official where there are no statutes or reasonable and definite standards to guide his action and without a proper governmental objective is an amorphous practice constituting an abridgment of First Amendment guarantees and is an interference with the paramount parental right over the education of his child recognized by this Court in *Pierce v. Society of Sisters*, 268 U. S. 510	15
Conclusion	19

Page

Appendix A. Decision of Eastern District of New York 21

Appendix B. Decision of Second Circuit 29

CASES CITED.

Abington School District v. Schempp, 374 U. S. 203 (1963) 3, 5, 8, 9, 10, 20

Bolling v. Sharpe, 347 U. S. 497 17

Engel v. Vitale, 370 U. S. 421 ..... 3, 5, 8, 9, 20

Griswold v. Connecticut, 381 U. S. 481, 482 18

King v. New York, 340 U. S. 293, 295 17

McCollum v. Board of Education, 333 U. S. 203 20

Murray v. Curlett, 374 U. S. 203 (1963) .. 3, 5, 8, 9, 11, 20

Niemotko v. Maryland, 340 U. S. 268 16

Pierce v. Society for Sisters, 268 U. S. 510 .... 3, 7, 15, 18

Poulos v. New Hampshire, 345 U. S. 395 15

Sherbert v. Verner, 374 U. S. 398 11

Zorach v. Clauson, 343 U. S. 306 20

OTHER AUTHORITIES.

Civil Rights Statute:

42 U.S.C.A. 1983 6

28 U.S.C.A. 1343 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No.

IN THE MATTER

of

The Application of KIMBERLY STEIN, a minor, by Audrey H. Stein, his parent and next friend, *et al.*,

Petitioners-Appellants,

against

ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York,

and

MAX J. RUBIN, *et al.*, constituting the Board of Education of the City of New York,

and

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Defendants-Appellees.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Kimberly Stein, *et al.*, petitioners and appellants in this proceeding, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals, Second Circuit, entered on July 7, 1965, which reversed the final order, judgment and decree of the United States District Court for the Eastern District of New York entered January 28, 1964 (Bruchhausen, J.), which (1) denied the defendants' motion to dismiss the plaintiffs' amended complaint for legal insufficiency; (2) granted the plaintiffs' motion for summary judgment; (3) adjudged and declared that the infant plaintiffs have a constitutional right to offer a prayer voluntarily each day in their respective classrooms in public schools; (4) enjoined the defendants from interfering with prayers voluntarily offered to God each day by the infant plaintiffs in their respective classrooms; and (5) directed the defendants to offer the infant plaintiffs an opportunity to pray voluntarily to God each day in their respective classrooms while in public school. The prayers and the right of the infant plaintiffs to offer them were made subject "to such reasonable rules and regulations as may be prescribed by the school authorities."

Opinions Below.

The opinion of the District Court is reported in 224 Fed. Supp. 757 and is set forth herein as Appendix A. The unreported opinion of the Circuit Court of Appeals is annexed hereto as Appendix B.

Jurisdiction of This Court.

The order of the Court of Appeals reversing the District Court was entered on July 7, 1965. Jurisdiction to review the judgment of the United States Court of Appeals, Second Circuit, is conferred on this Court by Title 28, U. S. C., Section 1254.

Questions Presented.

1. May the State without good cause and solely as a matter of law ban all prayers in public schools and in effect deny children attending public schools the opportunity to voluntarily offer a prayer of their own choosing to God while in school and does such ban constitute:

(a) A denial of the free exercise of religion and a denial of the right of free speech guaranteed to said children and their parents by the First and Fourteenth Amendments to the Constitution of the United States?

(b) An interference with the paramount parental right over the education of his child recognized by this Court in *Pierce v. Society for Sisters,* 268 U. S. 510.

2. Does the 1st amendment as interpreted by this Court in *Engel v. Vitale,* 370 U. S. 421, and *Abington School District v. Schempp* and *Murray v. Curlett,* 374 U. S. 203, require the banning of all prayers in public schools?

3. Is not the decision of the United States Court of Appeals, Second Circuit, decided on July 7, 1965 and unreported as yet in violation of the First and Fourteenth Amendments to the United States Constitution.

4. Do the rights of free exercise of religion, free speech and equal protection of the laws prescribed in the First and Fourteenth Amendments of the United States Constitution require an accommodation to the religious needs of parents and children attending public schools subject to such reasonable rules and regulations as may be prescribed by the school authorities and is such accommodation within the doctrine of neutrality discussed by this Court in *Abington School District v. Schempp* and *Murray v. Curlett, supra?*

Constitutional and Statutory Provisions Involved.

The First Amendment to the Constitution reads in part as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *."

The first section of the Fourteenth Amendment to the United States Constitution reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The act of the principal in banning all prayers and the support given to his position by the City Board of Education and the State Board of Regents is an amorphous practice without the guidelines of any statute or law.

Statement of the Case.

The Facts.

Petitioners are children attending classes as students at P. S. 184, Whitestone, New York. The defendants are Elihu Oshinsky, Principal of P. S. 184, Whitestone, New York, The Board of Education of the City of New York and the Board of Regents of the State of New York.

The defendant Oshinsky, in October, 1962, after the Supreme Court of the United States had decided *Engel v. Vitale,* 370 U. S. 421, but prior to the decision in *Abington School District v. Schempp* together with *Murray v. Curlett,* 374 U. S. 203 (1963), ordered all of his teachers to stop all children in the school from reciting prayers in their classrooms. The principal's order at first applied to simple prayers of grace said by the children before they ate their milk and cookies. The prayers were two in number. They were:

"GOD IS GREAT, GOD IS GOOD
AND WE THANK HIM FOR OUR FOOD, AMEN."

which was recited by kindergarten children in morning sessions and

"THANK YOU FOR THE WORLD SO SWEET
THANK YOU FOR THE FOOD WE EAT
THANK YOU FOR THE BIRDS THAT SING
THANK YOU GOD FOR EVERYTHING"

which was recited by kindergarten children in afternoon sessions.

The actions of Mr. Oshinsky were upheld by the defendant New York City Board of Education and by the defendant Board of Regents.

The parents of the infants thereupon caused a Notice to be served upon defendants demanding that their children be given "an opportunity to express their love and affection to Almighty God each day through a prayer in their respective classrooms." The original Notice and proof of service was submitted to the Court and a copy thereof annexed to the complaint and marked "Exhibit A" (31a).* The said notice was served on behalf of children in various grades of P. S. 184. Eight of the infant petitioners were in the kindergarten, two in the first grade, four in the

* Reference is to appellees' appendix in the Circuit Court of Appeals record.

second grade, two in the third grade, two in the fourth grade, three in the fifth grade and one in the sixth grade. All demanded "an opportunity to express their love and affection to Almighty God." The instant action by infant petitioners is based upon that written notice on behalf of themselves and all others similarly situated. The infant petitioners and their respective parents are members of the Protestant, Roman Catholic, Jewish, Armenian Apostolic and Episcopalian faiths.

Originally, the demand was refused on the ground that the issues of prayers in school and Bible reading in schools were before the Supreme Court of the United States for determination and hence prayers "may be unlawful." Since the Supreme Court decided *Abington School District v. Schempp* together with *Murray v. Curlett, supra,* there has been no change in the policy of the defendants.

The amended complaint alleged and was deemed admitted for the purposes of the motions before the District Court that the defendants "had instituted a policy of banning prayers in public schools of the City of New York and of the State of New York, even where the opportunity to pray is sought by the students themselves." The complaint was filed on March 14, 1963. The amended complaint was filed on March 29, 1963. The defendants moved for an order to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. The petitioners moved for summary judgment pursuant to Rule 56 the Federal Rules of Civil Procedure in that all the facts alleged in the complaint were deemed admitted and there were no genuine issues of any material fact.

The District Court accepted jurisdiction under the Civil Rights Statutes, 42 U.S.C.A. 1983 and 28 U.S.C.A. 1343 and held that the complaint did sufficiently raise a claim of denial of constitutional rights to the free exer-

cise of religion and to freedom of speech to warrant exercise of federal jurisdiction for the purposes of adjudicating it. The opinions of the District Court and the Circuit Court of Appeals both held that the establishment clause of the First Amendment to the United States Constitution would not prohibit New York from permitting in its public schools prayers such as those here at issue.

Reasons for Granting the Writ.

Petitioners submit (1) that the United States Court of Appeals, Second Circuit, has decided Federal questions of great substance not heretofore specifically determined by this Court or in the alternative (2) that the Court of Appeals has decided those questions in a way which is not in accord with applicable decisions of this Court and is in conflict with the First and Fourteenth Amendments to the Constitution, and (3) that the suppression of voluntary prayer in school by an administrative official where there are no statutes or reasonable and definite standards to guide his action and without a proper governmental objective is an amorphous practice constituting a prior restraint and an abridgment of First Amendment guarantees and is an interference with the paramount parental right over the education of his child recognized by this Court in *Pierce v. Society of Sisters*, 268 U. S. 510.

1. The federal questions herein have not heretofore been specifically determined by this court.

The issues here are important as they involve the delicate balance that must be struck between free exercise of religion and the prohibition against the establishment thereof. This Court has duly noted the importance of these issues by recently granting writs of certiorari and deciding sev-

eral cases involving the same delicate balance, including *Engel v. Vitale,* 370 U. S. 42 (1962), and *Abington Township v. Schempp* and *Murray v. Curlett,* 374 U. S. 203 (1963). For the reasons stated below, these and other recent decisions of this Court in this area do not govern the important issues in the case at bar, but, like those cases, this case involves the intrusion of the State into the field of religion. Most importantly, this case involves the adoption of a policy by the Board of Regents of the Empire State, and subordinate educational authorities, with the primary purpose and effect of absolutely prohibiting the free exercise of religion in the public schools. The practice of religion sought to be allowed and barred by the State in this case does not originate with the State or find sanction or support in state statutes or rules. Rather, the State has interposed itself between persons who wish to say a prayer and the saying of that prayer. Such interposition is, in this case, without support of justifiable reason, but is solely based upon, it is submitted, a wrongful extension and misconstruction of recent opinions of this Court so as to bar religious practices in the public schools no matter their form, origin or circumstance.

2. The Circuit Court of Appeals has decided those questions in a way which is not in accord with applicable decisions of this Court and is in conflict with the First and Fourteenth Amendments to the Constitution.

The prior cases before this Court which come closest to presenting a question similar to that in this case would seem to be *Engel v. Vitale,* 370 U. S. 421 and *Abington School District v. Schempp* together with *Murray v. Curlett,* 374 U. S. 203. The *Engel* case involved the "Regents Prayer" wherein the Board of Education of Union Free School District No. 9, acting in its official capacity *directed* the school district's principal to cause

the said "Regents' 'Official Prayer'" to be said aloud in the presence of a teacher at the beginning of each school day.

In the *Engel* case the defendant Board of Regents herein had recommended the recital in public schools of an official "Regents Prayer" composed under its supervision. The irony is that in the case at bar, the same New York Board of Regents has now directed the banning of all prayers, even voluntary prayers of the children's own choice, in all New York public schools.

The *Abington* and *Murray* cases decided the validity of state statutes and rules and regulations requiring the recitation of prayers and Bible reading programs.

Petitioners contend that a program of voluntary prayers which is initiated, planned and conducted by the pupils without initiation, leadership, direction, planning, requirement or programming by the State is materially different from the programs ruled unconstitutional in the *Engel, Abington* and *Murray* cases and it was not the intention of this Court to ban all prayers or prayers of the people from our public schools nor is it the policy of this Court to permit a state to prohibit the free exercise of religion or the right of free speech to its populace or to its children in public school.

The defendants have taken Mr. Justice Black's dicta of *Engel v. Vitale*, 370 U. S. 421 (435):

> "It is neither sacriligious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance"

to mean that "no prayers of any kind, official or voluntary, are to be sanctioned in Public School" and in doing so

have violated Mr. Justice Black's further injunction of "leaving that purely religious function to the people themselves" by depriving petitioners and all others of all right to pray in public schools.

The Court below speaks of the "separation of church and state" (see Appendix B, p. 34):

> "After all that the states have been told about keeping the 'wall between church and state * * * high and inpregnable,' *Everson v. Board of Education*, 330 U. S. 1, 18 (1947), it would be rather bitter irony to chastise New York for having built the wall too tall and too strong."

It is respectfully submitted that this case is not a church and state case, but rather a "peoples free exercise of religion versus interference by the state case." As such it is not an "establishment" case but a "free exercise" case. Because it is a "free exercise case" it is therefore a "free speech" case.

This Court has discussed the Doctrine of Neutrality in *Abington School District v. Schempp, supra,* at page 222 where Mr. Justice Clark propounds a test for same:

> "The test may be stated as follows: what are the purpose and primary effect of the enactment: If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."

Mr. Justice Clark also states at page 225:

> "We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.' *Zorach v. Clausen, supra,* at 314. * * * neither aiding nor opposing religion."

At page 226:

> "In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment."

In the instant case the State has, in its action banning prayers, enacted a rule to which Mr. Justice Clark's question is to be put—"What is the purpose and primary effect of the enactment?" The answer is: The banning of prayer voluntarily sought to be offered by the pupils themselves. Petitioners contend that such enactment has as its purpose the preferment of those who do not believe in God over those who do believe and as its primary effect it uses the awesome power of the state to thwart the free exercise of religion and free speech of pupils attending public school.

The First Amendment, as applied to the states through the Fourteenth Amendment, forbids not only laws "respecting an establishment of religion" but also those "prohibiting the free exercise thereof." Thus the State must not burden one's right to life, liberty and property, to free speech, a free press, freedom of worship and other fundamental rights except to prevent grave and immediate danger to interests which the State may lawfully protect.

Sherbert v. Verner, 374 U. S. 398, decided the same day as the *Schempp* and *Murray* School Prayer cases, contains the most recent pronouncements of this Court on the application of the free exercise clause of the First Amendment.

Adele H. Sherbert, a Seventh Day Adventist, was discharged by her employer for her refusal to work on Saturday and was refused unemployment compensation by the South Carolina Employment Security Commission

on the ground that her refusal to work on Saturdays, causing other employers to refuse to hire her, disqualified her for failure to accept suitable work. She ultimately appealed to this Court on the grounds of an interference with the free exercise of her religion guaranteed her by the First Amendment as made applicable to the states by the Fourteenth Amendment.

Mr. Justice Brennan speaking for the majority pointed out that First Amendment rights are not easily subject to state interference or regulation.

> "Conduct or actions so regulated have invariably posed a substantial threat to public safety, peace or order" 374 U. S., p. 403.
>
> "It is too late in the day to doubt that liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or a privilege. * * *" 374 U. S. 404.
>
> "Only the gravest abuses endangering paramount interests, give occasion for permissible limitation." *Idem,* p. 406.

Dr. Leo Pfeffer, one of the most ardent advocates of the doctrine of separation of church and state who has appeared before this Court in almost every Church-State issue of our time, in testifying on April 30, 1964 before the Judiciary Committee of the U. S. House of Representatives, Second Session of the 88th Congress, in connection with the Becker and other proposed Amendments to the First Amendment to the Bill of Rights, had this to say:

> "I have to add a sixth fiction which I shall mention first. A completely erroneous assumption which seems to be prevailing among those who testified here, and I am afraid among some members of the committee. A completely erroneous assumption that the Supreme Court or any decision of the

Supreme Court or any courts of the United States from the lowest to the highest courts have forbidden children to read the Bible or pray in public schools.

"Nothing could be further from the truth. *There is not one word in any decision of the Supreme Court including Murray, Engel, Zorach, or McCollum, or any State court decision which can, to any extent, be interpreted as forbidding children to pray or to read the Bible in the public schools.* (Italics supplied.)

"I suppose if in the middle of an arithmetic class a child got a feeling, a need of praying out loud and would do so, I presume it would be within the authority of the schoolteacher to say to him, 'This is not the time to do it.' But subject to the obligation not to disturb the ordinary course of the school curriculum nothing in the Supreme Court decision—

"The Chairman. What did it do?

"Mr. Pfeffer. All it says is that the State through its agencies cannot *promote* or *establish* the reading of the Bible or recitation of prayers. Nothing at all to the effect that the *children may not of their own or at the request of their parents, who have the primary obligation, may not pray in the public school, subject, as I say, to the necessity of discipline. This is the whole basis of the first amendment.* (Italics supplied.)

"The first amendment has two parts. One part says Congress shall make no law respecting an establishment of religion and the other says no law prohibiting its free exercise. If a child felt it necessary to say a prayer before partaking of bread or milk or cookies and the State says you can't do that, that would be a violation of the free exercise clause and just as unconstitutional as the Supreme Court says in Murray it is for the teacher to say

to the children that you will now say grace or read from the Bible.

"The first amendment's guarantees secure rights to the individual and restricts the State. They are against statism. They say to the State in the matter of religion you keep your hands off. This is the sacred right, the sacred duty of each individual as a creature of God who alone can decide whether his child shall pray and what form the prayer shall be, if they read the Bible what version of the Bible.

"Hence, there is nothing in these decisions, and I challenge any person to find one word in them which interferes with any person's 'religious liberty' to pray or worship as he sees fit, subject again to the qualification that in exercising his right he may not disturb his neighbor who at that time may be reading history or grammar and would be disturbed by a vocal prayer." (Italics supplied.)

School Prayer Hearings, Part I, pp. 923, 924.*

Also testifying at the School Prayer Hearings other authoritative voices on Constitutional Law agreed:

Paul G. Kauper, Professor of Law, University of Michigan Law School:

"There is merit to the argument that if the public schools are indifferent to the religious factor in the life of the Nation, they are thereby contributing to an official philosophy of secularism and, therefore, are not being really neutral in religious matters. But on this point the question is whether the kinds of religious practices, authorized by the proposed amendment, contribute in any substantial way to

* References are to transcript of hearings before the Committee on the Judiciary, House of Representatives, 88th Congress, Second Session, on proposed amendments to the Constitution relating to prayers and Bible reading in the public schools in three parts entitled School Prayers and printed by the Government Printing Office.

neutralize secularistic tendencies of public school education and whether there are not more effective means of doing this without using the compulsive authority of the public school system to sanction sectarian practices. *The Supreme Court, it should be emphasized, has not held that there can be no prayers in public schools. Nothing in the Court's decision precludes school authorities from designating a period of silence for prayer and meditation or even for devotional reading of the Bible or any other book during this period.* (Italics supplied.)

"Indeed, it may be that consistent with the Court's decisions, as indicated by the Stein *case, schools may permit opportunity for voluntary participation in prayers of the students' own choice where the school authorities are not directly involved in prescribing the kind of prayer or in giving direction to it.* (Italics supplied.)

School Prayer Hearings, Part II, p. 1692, May 15, 1964.

3. The suppression of voluntary prayer in school by an administrative official where there are no statutes or reasonable and definite standards to guide his action and without a proper governmental objective is an amorphous practice constituting an abridgment of First Amendment guarantees, and is an interference with the paramount parental right over the education of his child recognized by this Court in *Pierce v. Society of Sisters*, 268 U. S. 510.

The Circuit Court of Appeals relied on *Poulos v. New Hampshire*, 345 U. S. 395, in support of its decision. That case was decided on procedural grounds and is

authority against the suppression of First Amendment guarantees. Mr. Justice Reed speaking for the majority said:

> "Regulation and suppression are not the same, either in purpose or result, and courts of justice can tell the difference" (p. 407).

Mr. Justice Black in his strong dissent in *Poulos* stated:

> "I do not challenge the Court's argument that New Hampshire could prosecute a man who refused to follow the letter of the law to procure a license 'to run businesses,' 'erect structures,' 'purchase firearms,' 'store explosives' or I may add, to run a pawnshop. But the First Amendment affords freedom of speech, a special protection; I believe it prohibits a state from convicting a man of crime whose only offense is that he makes an orderly religious appeal after he has been illegally, 'arbitrarily and unreasonably' denied a 'license' to talk. This to me is a subtle use of a creeping censorship loose in the land."

More in point with the case at bar is *Niemotko v. Maryland,* 340 U. S. 268, wherein this Court unanimously reversed a conviction of members of Jehovah's witnesses for disorderly conduct for using a public park for Bible talks without a permit.

Application for a permit had been denied by municipal authorities in the exercise of a power derived, not from a statute or an ordinance, but from a local practice not defining any standards or limitations. Mr. Chief Justice Vinson speaking for the Court held:

> "In the instant case we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amorphous 'practice' whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations, no circumscribing

> of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here" (pp. 271 and 272).

And in *King v. New York,* 340 U. S. 293, 295, this Court held:

> "We are here concerned with suppression not punishment. It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action."

The issue of whether the authorities did act within their powers on the issue of permitting "voluntary prayers" has not been determined by this Court.

However, this Court has previously spoken on the subject of school authorities depriving infant students of their civil liberties. *Bolling v. Sharpe,* 347 U. S. 497, where this Court held at page 399:

> "Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective."

In that case this Court held that:

> "Segregation in public school is not reasonably related to any proper governmental objective and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

Petitioners submit that in the instant case, the banning of prayers, the censorship imposed upon the minds of children, the prohibition of the free exercise of religion and of free speech by refusing the children an opportu-

nity to pray cannot be reasonably related to any "proper governmental objective" and likewise imposes on petitioners "a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

The amorphous practice of banning prayers by school authorities conflicts with the parent's right of control over their children and the right of privacy of the child. When parents encourage a child to recite a prayer before their meals and the child is told that he may not openly recite these prayers in school, there is an interference with these rights. The reach of the decision of school authorities in effect has gone beyond the hours of "nine to three." In effect this form of prayer and all prayer at home, in church and in the child's daily life has been discouraged as the child, quite obviously, tends to give great importance to the decisions of school authorities. The effect of this practice destroys the parent's right to have the child feel that God is with him the whole day long as well as the parent's right to have the child develop religious beliefs and religious expression. It further destroys the right of the child's privacy in that the school authorities have reached the developing religious education of the child and impaired it. See *Pierce v. Society of Sisters,* 268 U. S. 510, where the Court said at page 535:

> "The fundamental theory of liberty upon which all government in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instructions from public school teachers only. The child is not the mere creature of the state. Those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations."

The case of *Pierce v. Society for Sisters* was recently cited with favor by this Court in *Griswold v. Connecticut,* 381 U. S. at 481 and 482.

Hence, petitioners are entitled to a few moments each day in public school to express their love and affection to God through a voluntary prayer of their own choice.

Conclusion.

Since the State requires the attendance of Petitioners' children from 9:00 A. M. to 3:00 P. M. of each school day and thus pre-empts the greater part of their learning time, the school authorities are required to afford the free exercise of religion to those who request it during the pre-empted time. When the school authorities refused to prescribe any conditions whatsoever and instead banned all prayer, they not only ignored the request of the parents but they completely ignored their Constitutional duty.

The school authorities may neither absolutely ban nor absolutely deny opportunity for expression to children who seek to exercise their First Amendment rights. Since the children must yield to the compulsory education law and the paramount right of the school authorities to schedule and control the school day; the school authorities must yield to the Constitution and the paramount right of the children to be afforded an opportunity for religious expression when they or their parents so request.

We go so far as to say that banning prayer, or refusing to afford an opportunity to pray, is actually to set a scholastic framework which is other than neutral and is, in itself, unconstitutional. While the schools may not be forced to teach a certain response to God, they may not suppress all response.

The Establishment of "no response" is as unconstitutional as the Establishment of "official response."

Petitioners submit that this case *(Stein v. Oshinsky)* can distinguish *Engel v. Vitale (supra)* and *Abington School District v. Schempp* and *Murray v. Curlett (supra)*, in the same manner that *Zorach v. Clauson*, 343 U. S. 306, distinguished *McCollum v. Board of Education*, 333 U. S. 203, and thereby perform a distinct service to the religious needs of the people of the United States.

In light of the foregoing, it is respectfully submitted, that this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD J. BAZARIAN,
Attorney for Petitioners,
Office & P. O. Address,
39-01 Main Street,
Flushing, New York 11354.

THOMAS J. FORD,
Of Counsel

APPENDIX A.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

KIMBERLY STEIN, a minor by AUDREY H. STEIN, his parent and next friend, *et al.*,

Plaintiffs,

against

ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York;

and

MAX J. RUBIN, *et al.*, constituting THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

and

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Defendants.

No. 63-C-260.
December 20, 1963.

Appearances:

Edward J. Bazarian, Esq., Attorney for Plaintiffs.

Leo A. Larkin, Esq., Corporation Counsel, Attorney for Defendants Elihu Oshinsky, and Max J. Rubin, *et al.*, constituting the Board of Education of the City of New York, Joseph M. Callahan, Jr., Esq., Sidney P. Nadel, Esq., of Counsel.

John P. Jehu, Esq., Attorney for Defendant, Board of Regents of the University of The State of New York, Charles A. Brind, Esq., Counsel, State Education Department.

BRUCHHAUSEN, D. J.:

The infant plaintiffs seek a mandatory injunction, requiring the defendants to afford the plaintiffs an opportunity to express their love and affection to Almighty God each day through a prayer, voluntarily offered in their respective classrooms; an injunction, enjoining the defendants from interfering with the recitation of this prayer, and to declare such prayers constitutional. The defendants move to dismiss the complaint.

The facts indicate that the infant plaintiffs, students in P. S. 184, Whitestone, New York, were precluded from reciting a prayer pursuant to an order of the school principal. The prayers were as follows:

> "God is Great, God is Good
> And we thank Him for our Food,
> Amen."

The above prayer was recited by the kindergarten children in the morning classes prior to their partaking of milk and cookies.

The afternoon classes recited the following prayer:

> "Thank you for the World So Sweet
> Thank you for the food we eat
> Thank you for the birds that sing
> Thank you God for everything."

The New York City Board of Education and the Board of Regents of The University of the State of New York upheld the principal's ruling.

The infant plaintiffs by their parents demand an opportunity to express their love to God. These plaintiffs are

members of Protestant, Roman Catholic, Jewish, Armenian Apostolic and Episcopalian faiths.

The issue is whether the State may deny children attending public schools the opportunity to recite a daily prayer in classrooms, and does such denial constitute a prohibition against the free exercise of religion or a denial of free speech and finally does such ban conflict with the doctrine of neutrality required of a State in its relationship with its citizens.

It is alleged that this prohibition violates the free exercise clause and the free speech clause of the First Amendment of the Constitution of the United States as made applicable to the States by the Fourteenth Amendment of this document.

The defendants urge that this court is without jurisdiction because the complaint fails to allege the required monetary damage. It is well settled that an action brought pursuant to the Civil Rights statutes, 42 U.S.C.A. 1983 and 28 U.S.C.A. 1343(3), confers jurisdiction without the allegation or proof of any jurisdictional amount. *Douglas v. City of Jeanette, Pennsylvania, Pa.*, 1943, 319 U. S. 157; *Adams v. City of Park Ridge,* C. A. Ill., 1961, 293 F. 2d 585, 588; *American Federation of Labor, et al. v. Watson,* 327 U. S. 582, 590.

The defendants rely primarily upon the cases of *Engel v. Vitale,* 370 U. S. 421; *School District of Abington Township, Pennsylvania v. Schempp* together with *Murray v. Curlett,* both decided in 374 U. S. 203.

The facts in the *Engel* case, *supra,* established that the Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under State Law, directed the School District's principal to cause a prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day. This daily procedure was adopted on the recommendation of the State Board of Regents, a govermental agency, created pursuant to the State Constitution of the

State of New York. These state officials composed the prayer which they recommended and published as a part of their "Statement on Moral and Spiritual Training in the Schools," saying:

> "We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program."

Mr. Justice Black, writing for the Court in *Engel v. Vitale*, 370 U. S. 421, held in part at pages 430-431:

> "There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regent's prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is 'non-denominational' and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of govermental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct govermental compulsion and is violated by the enactment of laws which establish

an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive procedure upon religious minorities to conform to the prevailing officially approved religion is plain."

Subsequently in *Abington School District v. Schempp; Murray v. Curlett, Board of School Commissioners of Baltimore City,* 374 U. S. 203, the Court was again called upon to pass on the constitutionality of State statutes. The *Abington* case required a daily reading of at least ten verses from the Bible without comment, at the opening of each public school on each school day pursuant to Pennsylvania statute.

The *Murray* case required opening exercises in the schools of the city, consisting primarily of the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.

In both cases students were permitted to absent themselves or not take part in these exercises. The Supreme Court concluded both these cases violated the Establishment Clause by requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer in unison. These exercises were prescribed as part of the curricular activities of students, required by law to attend school. They were held in the school buildings under the supervision and with the participation of teachers employed in those schools. The State intended to institute a religious program and thus violated the Establishment Clause.

The case, at bar does not involve a State statute requiring the children or personnel to actively engage in or refrain from acknowledging their complete dependence upon God. It is merely a voluntary desire of the children without any coercion or pressure being brought to offer a prayer to the Almighty. It is in this light, the Court must decide whether the facts in this case constitute the establishment of religion prohibited by the First Amendment. The First Amendment provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

In *Zorach v. Clauson,* 343 U. S. 306, the Court at page 312 held in part:

> "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policeman who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty

> in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.' "

The Court further states at page 313:

> "We are a religious people whose institutions presuppose a Supreme Being."

The Court also, at page 314, held in part:

> "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competiton between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction."

See also *West Virginia State Board of Education v. Barnette,* 319 U. S. 624; *Holey Trinity Church v. United States,* 143 U. S. 457, 470, *Lawrence v. Buchmueller,* 243 N. Y. S. 2d 87; *Lewis v. Allen,* 159 N. Y. S. 2d 807.

The facts in his case together with the applicable law clearly indicate that the voluntary prayer offered by these

children is made without any compulsion and it is not prescribed by law, and does not tend to establish a religion in violation of the First Amendment.

Inasmuch as the School Board is invested with the power and obligation to conduct its affairs, including programming of classes and maintenance of discipline, the rights of the plaintiffs to say voluntary prayer must be subject to such reasonable rules and regulations as may be prescribed by the school authorities.

This opinion constitutes the findings of fact and conclusions of law.

The plaintiffs' motion for summary judgment is granted and defendants' motions are denied.

Settle order and decree on ten (10) days' notice.

APPENDIX B.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 457—September Term, 1964.

(Argued April 29, 1965 Decided July 7, 1965.)

Docket No. 28812

KIMBERLY STEIN, a minor by AUDREY H. STEIN, his parent and next friend, *et al.*,

Plaintiffs-Appellees,

v.

ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York,

and

MAX J. RUBIN, *et al.*, constituting the Board of Education of the City of New York,

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Defendants-Appellants.

Before:

Lumbard, Chief Judge,
Friendly and Anderson, Circuit Judges.

Appeal from an order of the District Court for the Eastern District of New York, Walter Bruchhausen, Judge, 224 F. Supp. 757 (1963), granting summary judgment to parents in an action by them to enjoin school officials from preventing the recitation of prayers on the children's initiative. Reversed, with instructions to dismiss the complaint.

Sidney P. Nadel (Leo A. Larkin, Corporation Counsel of the City of New York, Seymour B. Quel, Joseph M. Callahan, Jr., Benjamin Offner, of Counsel), for Defendants-Appellants, Oshinsky and Board of Education of the City of New York.

John P. Jehu (Charles A. Brind, Counsel, State Board of Education), for Defendant Board of Regents of the University of the State of New York.

Edward J. Bazarian, Flushing, N. Y., for Plaintiffs-Appellees.

Hahn, Hahn & Ford, Brooklyn, N. Y., filed brief for The Particular Synod of New York, Reformed Church in America as *amicus curiae*.

Stephen A. Hochman, New York, N. Y., filed brief for New York Civil Liberties Union as *amicus curiae*.

FRIENDLY, Circuit Judge:

The decision in *Engel v. Vitale*, 370 U. S. 421, condemning the "Regents' prayer" as violating the Establishment Clause of the First Amendment, held to be applicable to the states by the Fourteenth, was rendered on June 25, 1962, too late to affect the 1961-62 school year. The case now before us reflects a response to that decision by parents who think their children ought have some form of religious observance while in public school.

The amended complaint, filed in March, 1963, in the District Court for the Eastern District of New York, made the following allegations: The fifteen plaintiffs, of varying

religious faiths, are parents of twenty-one children, ranging from five to eleven years in age. The children attend Public School 184, at Whitestone, N. Y., in grades ranging from kindergarten to the sixth. The defendants are Elihu Oshinsky, principal of the school; the members of the Board of Education of New York City; and the Board of Regents of the University of the State of New York. On October 5, 1962, Mr. Oshinsky "ordered his teachers who were instructing the kindergarten classes to stop the infant children from reciting the simple and ancient prayer:

> 'God is Great, God is Good and We
> Thank Him for our Food, Amen!'

before they ate their cookies and milk in the morning session," and "ordered his teachers who were instructing the kindergarten classes for the afternoon session to stop the infant children from reciting the simple and ancient prayer:

> 'Thank You for the World so Sweet,
> Thank You for the Food We Eat,
> Thank Your for the Birds that Sing—
> Thank You, God, for Everything.' "

He also "ordered his teachers to stop the saying of any prayer in any classroom in P. S. 184, Whitestone, New York." The Board of Education and the Board of Regents have instituted a policy banning prayers in the public schools even when the opportunity to pray is sought by the students themselves, and by so doing have "condoned and/or directed" Mr. Oshinsky's actions. The plaintiffs had joined in a written demand to the defendants "that our children be given an opportunity to acknowledge their dependence and love to Almighty God through a prayer each day in their respective classrooms"; defendants had ignored this.

The defendants moved, under F. R. Civ. P. 12(b), to dismiss the complaint for lack of subject-matter jurisdiction and for failure to state a claim on which relief could be granted. Plaintiffs countered with a motion for summary judgment under F. R. Civ. P. 56, supported by an affidavit which added no allegations to those in the complaint and asserted that "the issues presented are purely Constitutional in nature and questions of law. No issues of fact are presented." Defendants filed no affidavits contradicting anything said in the complaint; they urged rather that the motion for summary judgment was premature and that their own motion did not admit the allegations of the complaint save for the purpose of raising the objections there stated. The court denied defendants' motion and granted plaintiffs', 224 F. Supp. 757 (1963). It signed an order prohibiting interference with prayer and requiring that a reasonable opportunity for it be provided each day, but stayed the order pending this appeal.

We see no force in defendants' argument that the posture of the case did not permit the grant of summary judgment to plaintiffs, whatever the merits of their claim and the adequacy of the showing in its support. Although F. R. Civ. P. 56(a) in its initial form would have postponed such a motion until answer had been filed, one of the purposes of the 1946 amendment was to permit a plaintiff to move for summary judgment while a pre-answer rule 12(b) motion was pending. 6 Moore, Federal Practice ¶56.07 (2d ed. 1953). We likewise cannot sustain defendants' contention that the complaint did not sufficiently raise a claim of denial of constitutional rights to the free exercise of religion and to freedom of speech "to warrant exercise of federal jurisdiction for purposes of adjudicating it" under 28 U. S. C. §1343(3). *Bell v. Hood*, 327 U. S. 678, 684 (1946). But we think the court erred in its ruling on the merits.

Plaintiffs say that *Engel v. Vitale, supra*, and the later decisions in *Abington School District v. Schempp* and *Mur-*

ray v. Curlett, both at 373 U. S. 203 (1963), held only that under the Establishment Clause of the First Amendment a state may not *direct* the use of public school teachers and facilities for the recitation of a prayer, whether composed by a state official as in *Engel* or not so composed but having a religious content as in *Abington* and *Curlett;* they argue that these decisions did not hold that a state could not *permit* students in public schools to engage in oral prayer on their own initiative. This may be true enough; if the defendants could prevail only by showing that permitting the prayers was prohibited by the Establishment Clause, the question would be whether the use of public property as a situs for the prayers, the consumption of some teacher time in preserving order for their duration, and the possible implication of state approval therefrom would attract the condemnation of *McCollum v. Board of Education,* 333 U. S. 203 (1948), or the benediction of *Zorach v. Clauson,* 343 U. S. 306 (1952), and *Sherbert v. Verner,* 374 U. S. 398, 409 (1963). Although we note in this connection defendants' serious contention that in the context of closely organized schooling of young children, "student-initiated" prayers are an illusion and any effective routine requires the active participation of the teachers, we shall assume, *arguendo,* in plaintiffs' favor that the Establishment Clause would not prohibit New York from permitting in its public schools prayers such as those here at issue. Nevertheless New York is not bound to allow them unless the Free Exercise Clause or the guarantee of freedom of speech of the First Amendment compels.

Neither provision requires a state to permit persons to engage in public prayer in state owned facilities wherever and whenever they desire. *Poulos v. New Hampshire,* 345 U. S. 395, 405 (1953). It would scarcely be argued that a court had to suffer a trial or an argument to be interrupted any time that spectators—or even witnesses or jurymen—desired to indulge in collective oral prayer. The case of the school children differs from that of spectators

—although not from that of witnesses or jurymen—in that, so long as they choose to attend a public school, attendance on their part is compulsory. N. Y. Educ. Law §§3201-29. But "the student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others." *Abington School District v. Schempp, supra,* 374 U. S. at 299 (concurring opinion of Mr. Justice Brennan). We are not here required to consider such cases as that of a Moslem, obliged to prostrate himself five times daily in the direction of Mecca, or of a child whose beliefs forbade his partaking of milk and cookies without saying the blessings of his faith. Cf. *Sherbert v. Verner, supra,* 374 U. S. at 399 n. 1. So far as appears, the school authorities might well permit students to withdraw momentarily for such necessary observances—or to forego the milk and cookies, just as they excuse children on holidays important to their religions.

Determination of what is to go on in public schools is primarily for the school authorities. Against the desire of these parents that their children "be given an opportunity to acknowledge their dependence and love to Almighty God through a prayer each day in their respective classrooms," the authorities were entitled to weigh the likely desire of other parents not to have their children present at such prayers, either because the prayers were too religious or not religious enough; and the wisdom of having public educational institutions stick to education and keep out of religion, with all the bickering that intrusion into the latter is likely to produce. The authorities acted well within their powers in concluding that plaintiffs must content themselves with having their children say these prayers before nine or after three; their action presented no such inexorable conflict with deeply held religious belief as in *Sherbert v. Verner, supra.* After all that the states have been told about

keeping the "wall between church and state . . . high and impregnable," *Everson v. Board of Education,* 330 U. S. 1, 18 (1947), it would be rather bitter irony to chastise New York for having built the wall too tall and too strong.

It was thus error to grant summary judgment to the plaintiffs. We think also that the case calls on us to direct judgment dismissing the complaint. Although denial of the defendants' motions to dismiss would not itself have been appealable, it goes without saying that the grant of summary judgment to the plaintiffs was a proper subject for appeal, 28 U. S. C. §1291, and 28 U. S. C. §2106 empowers us to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." Although we have found no authority directly on point, *First Nat'l Bank v. Maryland Cas. Co.,* 290 F. 2d 246, 251-52 (2 Cir.), cert. denied, 368 U. S. 939 (1961), is very close to being one. A further analogy is furnished by the settled rule, "Where, on an appeal from an order granting or continuing a temporary injunction, or from an order appointing a receiver, the equity of the bill is challenged and the attack upon it appears to be well founded, the power is conferred, and the duty is imposed, upon the appellate court to consider it, and if it is of the opinion that the relief sought by the bill cannot be granted, to so decide, and thus to save the parties to the suit further expense resulting from the endeavor to secure impossible relief." *Guardian Trust Co. v. Kansas City So. Ry.,* 171 Fed. 43, 51 (8 Cir. 1909) (Sanborn, J.), and cases cited; *Metropolitan Water Co. v. Kaw Valley Drainage District,* 223 U. S. 519, 523 (1912); *Triumph Hosiery Mills, Inc. v. Triumph Int'l Corp.,* 308 F. 2d 196, 200 (2 Cir. 1962); *Zentner v. American Fed'n of Musicians,* 343 F. 2d 758 (2 Cir. 1965). Plaintiffs' attorney has consistently maintained that all the facts are contained in the complaint and are before

the court; he did not indicate in argument that any facts warranting a different decision could be alleged or proved. Under these circumstances, we perceive no reason for not bringing this litigation to an end. See 6 Moore, *supra*, ¶¶56.12, 56.13, 56.27[2].

The jugment is reversed, with directions to dismiss the complaint.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 18 1965
JOHN F. DAVIS, CLERK

[38156]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 629

KIMBERLY STEIN, a minor, by AUDREY H. STEIN, his parent and next friend, *et al.*,

Petitioners,

against

ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York,

and

MAX J. RUBIN, *et al.*, constituting the Board of Education of the City of New York,

and

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENTS OSHINSKY AND BOARD OF EDUCATION OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

LEO A. LARKIN,
Corporation Counsel,
Attorney for Respondents,
Oshinsky and Board of Education
of the City of New York,
Municipal Building,
New York, N. Y. 10007.

SEYMOUR B. QUEL,
JOSEPH M. CALLAHAN, JR.,
SIDNEY P. NADEL,
BENJAMIN OFFNER,
of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Statement	1
Opinions Below	2
Question Presented	2
Facts	3
ARGUMENT:	
No substantial constitutional question is presented by the petitioners' contention that the "free exercise of religion" and "freedom of speech" provisions of the First Amendment to the United States Constitution require public school authorities to provide daily prayer periods in the public schools	6
Conclusion	12

CASES CITED

Abington School Dist. v. Schempp, 374 U. S. 203 (1963) 7, 8, 9, 10, 11

Cantwell v. Connecticut, 310 U. S. 296 (1940) 10

Engel v. Vitale, 18 Misc 2d 659, 191 N.Y.S. 2d 453 (1959) 9, 10

Engel v. Vitale, 370 U. S. 421 (1962) 4, 7, 10

McCollum v. Board of Education, 333 U. S. 203 (1948) 7, 10, 12

Murray v. Curlett, 374 U. S. 203 (1963) 11

PAGE

Poulos v. State of New Hampshire, 345 U. S. 395 (1953) 11

Reynolds v. United States, 98 U. S. 145 (1878) 11

Sherbert v. Verner, 374 U. S. 306 (1952) 11

United Public Workers v. Mitchell, 330 U. S. 75 (1947) 10

Zorach v. Clauson, 343 U. S. 306 (1952) 7, 12

Constitution Cited

United States Constitution:

First Amendment 2, 4, 6, 7, 8, 10

Fourteenth Amendment 5

Statute Cited

New York Education Law:

Sec. 2554 10

Sec. 3210, subd. 1(b) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 629

KIMBERLY STEIN, a minor, by AUDREY H. STEIN, his parent and next friend, *et al.*,

Petitioners,

against

ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York,

and

MAX J. RUBIN, *et al.*, constituting the Board of Education of the City of New York,

and

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENTS OSHINSKY AND BOARD OF EDUCATION OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

The plaintiffs in this action for a declaratory judgment and injunction seek a writ of certiorari to review a judg-

ment of the United States Court of Appeals for the Second Circuit, entered July 7, 1965, which reversed the final order, judgment and decree (one paper) of the United States District Court for the Eastern District of New York, entered January 28, 1964 (BRUCHHAUSEN, J.), and directed dismissal of the complaint. The final order, judgment and decree of the District Court (1) denied the defendants' motion to dismiss the plaintiffs' amended complaint for legal insufficiency, (2) granted the plaintiffs' motion for summary judgment, (3) adjudged and declared that the infant plaintiffs have an absolute constitutional right to offer a prayer voluntarily each day in their respective classrooms in public school, and (4) enjoined the defendants from interfering with prayers voluntarily offered to Almighty God each day by the infant plaintiffs in their respective classrooms while in public school. The prayers and the right of the infant plaintiffs to offer them were made subject "to such reasonable rules and regulations as may be prescribed by school authorities".

Opinions Below

The opinion of the United States District Court for the Eastern District of New York is reported in 224 F. Supp. 757. The opinion of the United States Court of Appeals for the Second Circuit is reported in 348 F. 2d 999.

Question Presented

Are public school authorities required, by the "free exercise of religion" and "freedom of speech" provisions of the First Amendment to the United States Constitution, to allocate a portion of the daily public school program, including school personnel and the school premises, in order that those pupils who desire to express their love and affection to Almighty God, may offer a voluntary prayer each day in their respective classrooms during each school day?

Facts

(1)

The twenty-one infant petitioners herein are pupils at Public School 184, Queens, New York, where they attend classes in each of the grades in the school, namely, classes ranging from the kindergarten through the sixth grade. Their ages vary between five years and eleven years; and they and their respective parents are members either of the Protestant, Jewish, Catholic, Armenian Apostolic or Episcopalian religions. Their action was brought on behalf of themselves and all others similarly situated (Amended Complaint, par. "2", Appendix 14a-16a).*

The complaint alleges that on or about October 5, 1962, defendant Oshinsky, the Principal of Public School 184, ordered his morning session kindergarten teachers to stop the morning kindergarten children from reciting the prayer "God is great, God is good and we thank Him for our food, Amen!" before they ate their cookies and milk in the morning session (Amended Complaint, par. "7", Appendix, 18a). On the same day he allegedly also ordered his afternoon session kindergarten teachers to stop those children from reciting the following prayer:

> "Thank You for the world so sweet,
> Thank You for the food we eat,
> Thank You for the birds that sing—
> Thank you, God, for everything."
> (Amended Complaint, par. "8", Appendix, 18a)

And on the same day the Principal allegedly also ordered his teachers to stop the saying of any prayer in any classroom in Public School 184 (Amended Complaint, par. "9",

---

* References are to the appendix to the brief of defendants-appellants Oshinsky and Board of Education of the City of New York in the United States Court of Appeals for the Second Circuit.

Appendix, 18a). It might be pointed out that the complaint does not allege that the kindergarten children recited the respective prayers on a voluntary basis or that the pupils in any of the other grades had ever recited prayers in their classrooms. It is reasonable to assume that five-year-old kindergarten children would recite a single, particular prayer only under instructions from and at the direction of their teachers. It might also be pointed out that the Principal's alleged order to his teachers occurred after the decision in *Engel* v. *Vitale,* 370 U. S. 421 (1962), where it was held that the voluntary conduct of a simple nondenominational prayer in the public schools was illegal.

The complaint then alleges that the defendants, the Board of Education of the City of New York and the Board of Regents of the State of New York, "have instituted a policy banning prayers in the Public Schools of the City of New York and the State of New York even where the opportunity to pray is sought by the students themselves, and as such" said defendants have "condoned and/or directed the actions of Defendant Elihu Oshinsky, Principal of P.S. 184, Whitestone, New York." (Amended Complaint, pars. "10-11", Appendix, 18a-19a). On or about February 13, 1963, the plaintiffs allegedly demanded of the defendants "that the infant plaintiffs be given an opportunity each day to acknowledge their dependence and love to Almighty God through a prayer in their respective classrooms" (Amended Complaint, par. "12", Appendix, 19a).

The remainder of the amended complaint consists of conclusory allegations to the effect that the defendants have a "non-discretionary" constitutional duty to grant public school children the opportunity to offer a prayer voluntarily, and that the defendants' failure to offer the infant plaintiffs an opportunity to offer a prayer to Almighty God violates the First Amendment to the United States Constitution, which inhibits laws prohibiting the free exercise of religion and abridging freedom of speech, made

applicable to the States by the Fourteenth Amendment to the United States Constitution (Amended Complaint, pars. "14-20", Appendix, 19a-21a).

The relief sought by the plaintiffs is that a decree be directed to the defendants "commanding them to cease interference with a prayer offered voluntarily by infant Plaintiffs each day to Almighty God in school and further commanding them to offer the Plaintiffs and infant plaintiffs an opportunity to offer a prayer to Almighty God each day in school and further for a Declaratory Judgment that such prayers voluntarily offered and such opportunity to offer a prayer by the children to Almighty God is Constitutional" (Amended Complaint, Appendix, 21a).

(2)

After the amended complaint had been served, and within the time stipulated by the parties during which the defendants could answer or otherwise move with respect thereto, the defendants moved, pursuant to Rule 12b of the Federal Rules of Civil Procedure, to dismiss the complaint for legal insufficiency (Appendix, 22a-23a). This motion, being based solely on grounds of legal insufficiency, was unaccompanied by affidavits. Thereafter, the plaintiffs moved, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment.

The District Court, deeming the defendants to be under a constitutional non-discriminatory duty to afford the infant plaintiffs an opportunity each day to express the love and affection which they have for Almighty God through a prayer in their respective classrooms, denied the defendants' motion to dismiss the complaint, and granted the plaintiffs' motion for summary judgment (Appendix, 6a-13a). The Court of Appeals, in an opinion by FRIENDLY, J., unanimously reversed and directed that the complaint be dismissed (Petitioners' Appendix B, pp. 29-36).

ARGUMENT

No substantial constitutional question is presented by the petitioners' contention that the "free exercise of religion" and "freedom of speech" provisions of the First Amendment to the United States Constitution require public school authorities to provide daily prayer periods in the public schools.

(1)

Reduced to its essence, the petitioners' position is that the constitutional guarantee of free exercise of religious worship gives them the unqualified, absolute right to carry their religious worship into the public school classroom. This right, say the petitioners, imposes a corresponding "non-discretionary" mandate upon the public school authorities to afford them the opportunity of offering a daily prayer in their respective classrooms during regular school hours. Thus, the question presented is whether the free exercise of religion is as absolute as the petitioners claim. More specifically, the question is whether the guarantee of freedom of religion, as set forth in both the "Establishment" and "Free Exercise" clauses of that constitutional guarantee, was intended to mandate the holding of daily prayer periods in the public schools. We believe that the purpose and intent of the First Amendment is that daily prayer periods shall not be held in the public schools. Certainly, there is no constitutional requirement for the holding of such daily prayer periods.

Recent decisions by this Court have made it clear that public school authorities may not provide for prayer programs or other religious exercises to be engaged in by public school children on school premises during school hours. The fact that such a program may be voluntary in that it permits the children free choice whether or not to participate has not freed it from condemnation under the First Amendment. Nor is the constitutional vice removed

by the fact that the prayer is nondenominational and nonsectarian. In short, the public school authorities are constitutionally inhibited from either requiring or sanctioning such a program (*Abington School Dist.* v. *Schempp* and *Murray* v. *Curlett,* both in 374 U. S. 203 [1963]; *Engel* v. *Vitale,* 370 U. S. 421 [1962]; *Zorach* v. *Clauson,* 343 U. S. 306 [1952]; *McCollum* v. *Board of Education,* 333 U. S. 203 [1948]).

The petitioners undoubtedly belong to that group of persons who sincerely believe that a public school education is not complete if it does not include provision for some form of religious manifestation. As a consequence, these persons were made unhappy by the decisions outlawing religious exercises in the public schools. And since the decisions rested primarily on the "Establishment" clause, the petitioners have seized upon the "Free Exercise" clause as a possible means of bringing religious exercises back to the schools. In other words, the petitioners are invoking the "Free Exercise" clause to constitutionally mandate the very same program which the courts have held the "Establishment" clause prohibits.

We submit that the "Regents' Prayer" in *Engel* v. *Vitale, supra,* and Bible Reading and The Lord's Prayer in the *Abington School District* and *Murray* cases, both cited *supra,* were not outlawed merely because they were initiated by the public school authorities. Nor do we believe that public school daily prayer periods must be conducted because some or even a majority of the public school children and their parents may desire it. We submit that religious exercises may not be held in the public schools because the intention of the First Amendment, as interpreted by the courts, is that the government, acting through the public schools, shall not become involved in matters of religion.

The freedom of religion provision of the First Amendment, when read as a whole, mandates government to

assume a role of complete neutrality with respect to religion. The prohibition against governmental involvement in religion, particularly in the instance of the use of the public schools, derives not from any hostility toward religion but rather from the judicial determination that the First Amendment intended and decreed that there be separation between the secular and religious in order to assure the supremacy of each in their respective spheres. The public schools necessarily must be limited to the secular education of their students. The religious training, education and practices of students are best left to the home, the parent, and the religious leaders.

(2)

The petitioners' contention that the "Free Exercise" clause mandates the holding of religious exercises in the public schools in order that those who wish to participate therein may do so, has been rejected by the Supreme Court.

Mr. Justice CLARK, writing for the Court in *Abington School Dist.* v. *Schempp,* 374 U. S. 203, *supra,* stated (p. 225):

> "Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone,* it has never meant that a majority could use the machinery of the State to practice its beliefs." (Italics in original)

By way of further answering the contention that religious exercises in the public schools could be constitutionally upheld under the Free Exercise Clause, Mr. Justice CLARK pointed out the lack of necessity for permitting religious exercises in the public schools, by stating (p. 226, footnote):

> "We are not of course presented with and therefore do not pass upon a situation such as military service,

> where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of governmental facilities, military personnel would be unable to engage in the practice of their faiths."

Mr. Justice BRENNAN, addressing himself to the same subject in his concurring opinion in the *Abington* case, stated (p. 299):

> "The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others. The situation of the school child is therefore plainly unlike that of the isolated soldier or the prisoner."

In *Matter of Engel* v. *Vitale,* 18 Misc 2d 659, 191 N.Y.S. 2d 453 (Sup. Ct., Nassau Co., 1959), reversed on other grounds, 370 U. S. 421, *supra,* the Court at Special Term said (18 Misc 2d at p. 699, 191 N.Y.S. 2d at p. 495):

> "This is not to say, however, that the board may be compelled to permit the saying of a prayer in the schools. The cases discussed above make clear that though the 'free exercise' clause allows wide latitude to the individual in public expression of his belief and public demonstration of his worship, the freedom is not absolute. No sacred cow may impede the flow of traffic so necessary to the general welfare; no belief in polygamy, save the believer from prosecution. The state may determine the time and place, and within the limits suggested above, the manner of the exercise of such freedom, when it acts to protect its own legitimate interests or that of other citizens. The state may, therefore, in determining the curriculum of its schools, exclude any form of devotional exercise."

Obviously if the Free Exercise Clause were as broad and literal as contended by the petitioners, the *McCollum, Engel* and *Abington* cases, cited *supra,* would not have been decided as they were. If public school children have the constitutional right to be afforded the opportunity to offer a prayer voluntarily, the Board of Regents' Prayer in the *Engel* case, which the children had a right to utter or to refrain from uttering, would have been upheld under the Free Exercise right of those who wished to utter it rather than have been condemned under the Establishment Clause. Similarly, the voluntary Bible Reading and Lord's Prayer programs in the *Abington* case and the voluntary religious instructions in the *McCollum* case would have been upheld.

(3)

The respondents herein are charged with the power and duty of administering the public school system of the City of New York (New York Education Law § 2554). And in connection therewith, the respondents necessarily must establish curricula, provide for the discipline of pupils, and otherwise provide for the daily administration of the public schools.

Certainly, no child may disregard his classroom assignment and take it upon himself to engage in any kind of discussion that might then happen to strike his fancy. Obviously, he could not invoke his constitutional guarantee of free speech to sustain such conduct. The orderly administration and discipline of the public schools necessarily requires that his right of free speech yield and that he refrain from such conduct. Similarly, the plaintiffs herein may not invoke the Free Exercise Clause as a basis for requiring that the public schools be made available to them to practice their beliefs. Neither freedom of speech nor freedom of religion is absolute. While freedom to believe is absolute, freedom to act is not (*Cantwell* v. *Connecticut,* 310 U. S. 296, 303-304 [1940]; *United Public Workers* v.

Mitchell, 330 U. S. 75, 95 [1947]; *Reynolds* v. *United States,* 98 U. S. 145 [1878]; *Poulos* v. *State of New Hampshire,* 345 U. S. 395 [1953]).

The petitioners have not even alleged that they are under any compulsion to engage in the daily recitation of a prayer only during schools hours or that the prayer they wish to say is required by their respective religions. Cf. *Sherbert* v. *Verner,* 374 U. S. 398 (1963). By their own admission their daily recitation of a prayer on public school premises during school hours would be purely voluntary on their part. What the petitioners in effect are seeking to do is to impose religious practices upon the public schools, and to obtain the aid of the State therefor through use of the public schools and school personnel. This the respondents are constitutionally prohibited from permitting. And even if the respondents could permit it, they would not be required to do so.

We are not here concerned with a situation where a particular child may be under a religious compulsion to engage in a particular religious action only during usual school hours. In such a specific situation an accommodation could be made. The New York Education Law (§ 3210, subdivision 1b) authorizes the excuse of pupils for religious observance. In the case at bar, however, we are concerned with an entirely different situation. We are not concerned with the case of confined soldiers or prisoners who, if not granted State assistance in the form of chapels and chaplains, would be entirely deprived of their right to engage in prayers required by their religious beliefs. In the instant case "the student's compelled presence in school for five days a week in no way renders the religious facilities of the community less accessible to him than they are to others" (*Abington School Dist.* v. *Schempp* and *Murray* v. *Curlett, supra,* both in 374 U. S. 203, at p. 299).

The Board of Education of the City of New York may not provide the religious program which the petitioners

herein are seeking. To do so would in effect amount to a "released time" program for religion in the schools which would be in direct contravention of the holding in *McCollum* v. *Board of Education, supra,* 333 U. S. 203. On the other hand, the Board of Education of the City of New York has a "released time" program which permits the release of students for religious instruction and practices outside the schools. This program has been considered and approved in *Zorach* v. *Clauson, supra,* 343 U. S. 306. The Board of Education may not be required to provide more than what it is doing under its "released time" program. The program which the petitioners are seeking is constitutionally impermissible. In no event is it required of the respondents.

CONCLUSION

The petition for a writ of certiorari should be denied.

October 15, 1965.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel,
Attorney for Respondents,
Oshinsky and Board of
Education of the City of New York.

SEYMOUR B. QUEL,
JOSEPH M. CALLAHAN, JR.,
SIDNEY P. NADEL,
BENJAMIN OFFNER,
of Counsel.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 27 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 629

KIMBERLY STEIN, a minor, by AUDREY H. STEIN, his parent and next friend, *et al.*,

Petitioners,

against

ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York,

and

MAX J. RUBIN, *et al.*, constituting the Board of Education of the City of New York,

and

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION OF BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

CHARLES A. BRIND
Attorney for Board of Regents of the University of the State of New York, Respondents
State Education Building
Albany, New York 12224

JOHN P. JEHU
ELIZABETH M. EASTMAN
LOUIS H. J. WELCH
of Counsel

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction of this Court	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	6
Procedural History	6
Factual Background	7
Argument	10
Point I. The decision of the District Court was properly reversed for being wholly contrary to the previous decisions of the United States Supreme Court	10
Point II. The District Court could have been reversed because on the previous decisions of this Court, it was without jurisdiction over the subject matter	16
Point III. The District Court could have been expressly reversed for failure of the amended complaint to set forth a claim supporting relief	22
Point IV. For all the foregoing reasons the petition for Writ of Certiorari should be denied	30
Conclusion	32

TABLE OF CASES.

Abington Township v. Schempp, 374 U. S. 203 ... 2, 6, 9, 10, 16, 19, 21, 23, 24, 25, 26, 27, 28, 30, 31

American Distilling Co. v. City of Sausalito, 73 F. Sup. 520 ... 18

Bell v. Hood, 327 U. S. 678 ... 21

Bianchi v. Morales, 262 U. S. 170 ... 20

Buck v. Case, 24 F. Sup. 541 (Reversed on procedural grounds, 307 U. S. 95) ... 18

PAGE

Church of the Holy Trinity v. U. S., 143 U. S. 457 ... 31
Engel v. Vitale, 370 U. S. 421 ....2, 9, 10, 12, 13, 15, 16, 19, 20, 21, 23, 24, 25, 27, 28, 30, 31
Everson v. Board of Educ., 330 U. S. 1 26
Gilstrap *et al.* v. Standard Oil Co. *et al.*, 108 F. 2d 736, Cert. den. 311 U. S. 661 20
Halliburton Company *et al.* v. Norton Drilling Company, 302 F. 2d 431 23
Hannis Distilling Co. v. Baltimore, 216 U. S. 285 20
Harris v. Rosenberger, 145 Fed. 449 20
Illinois *ex rel.* McCollum v. Board of Educ., 333 U. S. 203 .....2, 9, 11, 27, 28, 30
Kansas v. Bradley, 26 Fed. 289 20
Levering & Garrigues Co. v. Morrin, 289 U. S. 103 .. 20
Lewis v. Allen, 14 N. Y. 2d 867; 379 U. S. 923 31
McCollum v. Board of Education, 333 U. S. 203 ..2, 9, 11, 27, 28, 30
McGilvra v. Ross, 215 U. S. 70 20
McGowan v. Maryland, 366 U. S. 420 .....13, 26, 27
McNutt v. General Motors, etc. Corp., 298 U. S. 178 .. 18
Murray v. Curlett, 374 U. S. 203 ....2, 6, 10, 16, 19, 21, 23, 25, 26, 28, 30, 31
Norton v. Whiteside, 239 U. S. 144 20
Pierce v. Society of Sisters and Pierce v. Military Academy, 268 U. S. 510 15
Poulos v. New Hampshire, 345 U. S. 395 29
Torcaso v. Watkins, 367 U. S. 488 .....13, 27
Troy Laundry Co. v. Lockwood, 63 F. Sup. 384 18
Water Service Co. v. Redding, 304 U. S. 252 20
Welcher v. U. S., 14 F. R. D. 235 23
West Virginia Bd. of Educ. v. Barnette, 319 U. S. 624 25
Zorach v. Clauson, 343 U. S. 306 .....28, 31

CONSTITUTION CITED

First Amendment 3, 12, 16, 25, 28, 29
Fourteenth Amendment 3, 12, 17

STATUTES CITED.

N. Y. Education Law § 207 .....3, 24
N. Y. Education Law § 1079, subds. 1, 2, 3, 13, 33 ....4, 23
N. Y. Education Law § 2554, subds. 1, 11, 13 .....5, 23
28 U. S. C. § 1254 2

PAGE

28 U. S. C. § 1291 7
28 U. S. C. §§ 1331, 1332 18
28 U. S. C. § 1343, subd. 3 18
42 U. S. C. § 1983 18

OTHER AUTHORITIES CITED.

Decision of N. Y. Commissioner of Education in Matter of Rubinstein, 2 Ed. Dept. Rep. 299 .....29, 31
Decision of N. Y. Commissioner of Education in Matter of Worthing, 3 Ed. Dept. Rep. 7 .....29, 31
(These decisions are set forth in full in the Appendix to our brief below, pp. A-12 and A-19 and are part of the record filed under Rule 21 (1) of the Rules of this Court.)

IN THE

Supreme Court of the United States

October Term, 1965

No. 629

KIMBERLY STEIN, a minor, by AUDREY H. STEIN, his parent and next friend, *et al.*,

Petitioners,

against

ELIHU OSHINSKY, Principal, Public School 184, Whitestone, New York,

and

MAX J. RUBIN, *et al.*, constituting the Board of Education of the City of New York,

and

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION OF BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

Opinions Below

The opinion of the United States District Court for the Eastern District of New York (Bruchhausen, J.), is reported at 224 Fed. Supp. 757.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 348 Fed. 2d 999.

Jurisdiction of this Court

The order of the United States Court of Appeals for the Second Circuit was entered on July 7, 1965. Jurisdiction to review the judgment of the said Court of Appeals is conferred on this Court by Title 28 U. S. C. Section 1254.

Questions Presented

1. Did not the High Court, when it prohibited a local board of education from "sanctioning" daily prayers in the public schools (*Engel*) include a prohibition against any teacher or principal from selecting and directing, as he for practical reasons must, any such daily prayers to be said out loud and in unison, even where there is no compulsion, and even when some or all of the specific parents involved do not object, or even request such procedure? And, hence, is not the order of the Court of Appeals in the cause at bar simply a restatement of the pertinent decisions of the United States Supreme Court?

2. Did not the District Court lack jurisdiction over the subject matter, when previous decisions of the United States Supreme Court have completely foreclosed the existence of any substantial Federal question?

3. Viewed against the decisions of this Court in *McCollum, Engel* and *Schempp* and *Murray,* does not a complaint asking for the right to say prayers, out loud and in unison, in the public schools during the school day, based on the absence of compulsion, and based on the consent of some or all of the parents, fail to state a claim upon which relief can be granted?

4. Should not the writ of certiorari be denied where the Court of Appeals not only

a. correctly decided the issue, *but also*

b. could have based its decisions on two other valid grounds;

and where

c. all three of these grounds on which the correct decision of the Court of Appeals was or could have been grounded, are squarely based on previous, consistent and clear decisions of this Court, thus making any further pronouncement by this Court wholly unnecessary?

Statutes Involved

Constitutional Provisions Involved

The First Amendment to the Constitution reads in pertinent part as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *"

The first section of the Fourteenth Amendment to the United States Constitution reads as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State therein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Excerpts from New York Educational Law

"§ 207. Legislative power. Subject and in conformity to the constitution and laws of the state, the

regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except, as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trusts conferred or charged upon the university and the education department. * * *"

"1709. Powers and duties of boards of education.

"The said board of education of every union free school district shall have power, and it shall be in its duty:

"1. To adopt such by-laws and rules for its government as shall seem proper in the discharge of the duties required under the provisions of this chapter.

"2. To establish such rules and regulations concerning the order and discipline of the schools, in the several departments thereof, as they may deem necessary to secure the best educational results.

"3. To prescribe the course of study by which the pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant.

* * *

"13. To have in all respects the superintendence, management and control of said union free schools * * *

* * *

"33. To have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes.

* * *"

"§ 2554. Powers and duties of board of education.*

"Subject to the provisions of this chapter, the board of education in a city shall have the power and it shall be its duty:

"1. To perform any duty imposed upon boards of education or trustees of common schools under this chapter or other statutes, or the rules of the regents and regulations of the commissioner of education so far as they may be applicable to the school or other educational affairs of a city, and not inconsistent with the provisions of this article * * *

* * *

"11. To authorize the general courses of study which shall be given in the schools and to approve the content of such courses before they become operative.

* * *

"13. a. To prescribe such regulations and by-laws as may be necessary to make effectual the provisions of this chapter and for the conduct of the proceedings of said board and the transaction of its business affairs, for the general management, operation, control, maintenance and discipline of the schools, and of all other educational, social or recreational activities and other interests under its charge or direction.

"b. In a city having a population of one million or more, the board of education shall prescribe such regulations and by-laws authorizing the superintendent of schools to exercise such of its administrative and ministerial powers as the board may deem necessary to make effectual the provisions of this chapter and for the general management, operation, control, maintenance and discipline of schools, and of all other educational, social or recreational activities and other interests under its charge or direction. If in the exercise of its discretion and in order better to discharge its policy-making and other functions and to provide for the efficient administration of the educational sys-

* This section applies to the City School Districts of the Cities of New York, Buffalo, Rochester, Syracuse, Yonkers and Albany only.

tem, the board delegates any of its administrative and ministerial powers to the superintendent of schools, such superintendent shall exercise such delegated powers in the same manner and with the same force and effect as if such powers were given to him under the provisions of the education law."

Statement of the Case

The statement of the case, as required by Rules 24, 39 and 40 of the Rules of this Court is here subdivided into statements of, respectively, the procedural history and the factual background.

Procedural History

The supplemental summons and amended complaint are dated and verified, respectively, on March 29, 1963.

In view of the pendency, at the time, of the decision of the United States Supreme Court in *Abington Township* v. *Schempp* and *Murray* v. *Curlett*, and for other reasons after the decision in these cases was handed down, the time of respondents to answer or otherwise move with respect to the amended complaint was extended by stipulation until October 30, 1963.

Instead of interposing answers, all respondents on October 22, 1963, noticed motions to dismiss the amended complaint for lack of jurisdiction over the subject matter and for failure of the amended complaint to state a claim upon which relief can be granted.

Petitioners, on November 6, 1963, noticed motion for summary judgment. Affidavits in opposition to and support for such motion were filed.

The cause was argued before the United States District Court for the Eastern District of New York, District Judge Bruchhausen presiding.

Thereafter, on December 20, 1963, and without giving respondents an opportunity to interpose answers to the amended complaint and, therefore, without having any allegations of the said complaint either admitted or denied, *i.e.*, without any proper factual basis for arriving at a judgment, the District Court handed down its decision, granting petitioners' motion for summary judgment and denying respondents' motions.

The order of the District Court was thereafter signed by Judge BRUCHHAUSEN, incorporating therein, at respondents' request, a stay of execution *pendente lite*.

Respondents thereupon appealed from that decision pursuant to 28 U. S. C. Section 1291. The case came on for oral argument before Chief Judge LUMBARD and Circuit Judges FRIENDLY and ANDERSON, and the Court of Appeals, by FRIENDLY, C. J., reversed the District Court (348 Fed. 2d 999).

Petitioners now seek a writ of certiorari to the Court of Appeals.

Factual Background

It must here be immediately emphasized that for lack of an answer having been submitted, the "findings of fact" contained in the decision of the District Court must be taken to mean "allegations of the amended complaint". It must further be emphasized that all material allegations of the complaint are deemed *admitted solely for the purpose of the motions to dismiss*, and that such admissions cannot be considered such for any other purpose. They cannot, particularly, be considered to be admissions for the purpose of summary judgment.

The pertinent allegations of fact in the amended complaint are as follows:

Principal Oshinsky of P. S. 184, Whitestone, on or about October 5, 1962, ordered his kindergarten teachers to stop two certain stated prayers which had been said, out loud and in unison, by these kindergarten children in the morning and afternoon, up to that time. (Paragraphs numbered 7 and 8.)

It is, here, of utmost significance, that there is no allegation in the amended complaint anywhere, which would state that the kindergarten children, whose prayers were stopped by the principal, themselves selected the prayer and the time and place therefor, and prayed on an entirely spontaneous and voluntary basis rather than by having the teacher order them to pray, teaching them the wording of the prayer in question, and daily supervising and correcting their performance.

Up to this point, therefore, there is no connection between the various statements in later paragraphs of the amended complaint relating to the voluntary nature of prayers allegedly prohibited by the Board of Education and the Board of Regents.

Thus, as to the seven of the 21 infant petitioners who were attending kindergarten, there is *not even an allegation that the kindergarten prayers referred to in paragraphs 7 and 8 of the amended complaint were actually "voluntary"*. Nor is there even an allegation as to just how such prayers might be claimed or considered to be "voluntary".

As to the remaining 14 infant petitioners who were attending higher grades and were not at all involved in the prohibited kindergarten prayer, there is no allegation whatever that they ever prayed in school at all.

Hence, it is clear from the complaint, that all that is involved here is the presumed fact that the parents of the seven kindergarten children did not object to their children

praying in school. This, of course, is the same factual situation that existed in McCollum, Engel and Schempp.

It will also be noted that the amended complaint states that two of the seven kindergarten children are Protestants, while the five other kindergarten children are Roman Catholic. The other 14 infant plaintiffs are divided among the Protestant, Roman Catholic, Jewish, Armenian Apostolic and Episcopalian faiths.

There are two basic reasons why, as a matter of fact, such "voluntary" prayers cannot be voluntary, *i.e.*, must be directed by the school officials (be it the Board of Education, the Superintendent, principal, teachers or other school personnel).

1. In our pluralistic society, of which the public school is the prime exponent, there are bound to be pupils of many different faiths. Obviously, not all pupils will even know the same prayers. A specific prayer must be selected by somebody other than the pupils, *i.e.*, by the teacher or principal. *Hence, the school must play the moving role in the selection of any such prayer.*

2. More importantly, however, the school is responsible for the program of the school day. Children cannot be allowed to pick their own time to speak on whatever subject may strike their fancy; nor can they pick the subject on which they may wish to exercise their "freedom of speech", on which petitioners rely in part.

So, for this reason also, the school must be the moving force. Any other solution would obviously lead to chaos and disintegration of the school system. In fact, the District Court found it necessary, for these very reasons, to concede that the school authorities had to have the power to make "reasonable rules and regulations" on this subject.

This, in turn, of course makes the whole procedure impermissible under the decisions of this Court, as set forth below in the argument.

As far as the allegations of paragraph 11 of the amended complaint are concerned, the legal staff of the Board of Regents is not aware that the Board ever had any knowledge of this whole matter until the service of the amended complaint. It is true, however, that the Board at appropriate times made statements to the effect that it is expected that the schools of the State of New York will honor the decisions of the United States Supreme Court in relation to prayer and the reading of the Bible. No answer having been interposed, however, these allegations have been neither admitted nor denied.

ARGUMENT

POINT I

The decision of the District Court was properly reversed for being wholly contrary to the previous decisions of the United States Supreme Court.

It is respectfully submitted that the judgment and decree of the District Court was wholly contrary to the decisions of this Court as handed down over the years in a long and consistent line of decisions and particularly in the decisions in the *Engel* and *Schempp* and *Murray* cases (370 U. S. 421 and 374 U. S. 203).

The conclusions of law in the District Court decision are to the effect that

a. Kindergarten children have the "constitutional right" to say out loud and in unison "voluntary" prayers, necessarily taught to them by the teachers;

b. Any interference with that "right" is a violation of the Constitution; and

c. The School Board has the right to establish "reasonable rules and regulations" under which the children can say, out loud and in unison, such a "voluntary" prayer, in school and during school hours.

In addition to the various quotations on this subject set forth in Point II, below, the following statements of this Court are here pertinent:

> Voluntariness "*simply has no relevance to the establishment question,* if it is once found that the practices are essentially religious exercises designed at least in part to achieve religious aims through the use of public school facilities during the school day." (Emphasis supplied.)
>
> (Concurring Opinion of Mr. Justice BRENNAN, at 374 U. S. 288.)

And again:

> "* * * *it is constitutionally irrelevant that the State has not composed the material* for the inspirational exercises presently involved." (Emphasis supplied.)
>
> (Concurring Opinion of Mr. Justice BRENNAN, at 374 U. S. 232.)

In fact, the entire part of Mr. Justice BRENNAN's concurring opinion, labelled (IV)C, beginning on page 288, is singularly apposite to the practices here at bar, which are impermissible for all the reasons set forth in that part of said opinion. Attention is particularly called to that part thereof which quotes Mr. Justice FRANKFURTER's answer to a similar contention made in the *McCollum* case:

> "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of

> influence by the school in matters sacred to conscience and outside the school's domain. *The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.*" (Emphasis supplied.)

Apposite also is the language of the Supreme Court in *Engel* (pp. 430-431):

> "This is not to say, of course, that laws *officially prescribing a particular form of religious worship* do not involve coercion of [non-observing] individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the *indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.*" (Emphasis supplied.)

In this connection it is just as plain, as a matter of fact, that the teacher in the cause at bar obviously had to instruct and direct the kindergarten children, coming from "Protestant, Roman Catholic, Jewish, Armenian Apostolic and Episcopalian faiths" (Opinion of District Court, 224 F. Supp. at 758) in order for them to be able to recite, out loud and in unison, the two specific prayers here involved. It is apodictic that such a directive, even when based on previous parental consent or even request, amounts to an impermissible legislative act of a branch of State government, contrary to the Establishment Clause of the First Amendment as applied to the States through the Fourteenth Amendment.

Nor has any reasonable explanation been offered by or on behalf of these petitioners why these children have to pray in the public schools during school hours, i.e. why it is, that the opportunities to pray which all these children have daily, before and after school, in their respective churches and temples, and in their homes, and on Sundays, Satur-

days and other holidays, are so insufficient that the limited time they have for secular instruction in the public schools should be used therefor.

Under previous decisions of this Court it is crystal clear that Prayer belongs in the home and the church and synagogue, but not into the public schools.

> "The First Amendment commands government to have no interest in theology or ritual; * * * On matters of this kind government must be neutral" (*McGowan* v. *Maryland*, 366 U. S. 420, 563-564).

> "Neither [a State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs" (*Torcaso* v. *Watkins*, 367 U. S. 488, 495).

Apposite here also is the language of Judge DYE of the New York State Court of Appeals, from his dissent in *Engel*, which was upheld by the United States Supreme Court in 370 U. S. 421. Speaking of the voluntary prayer in *Engel*, he said that it

> "falls squarely within the categories of disability accounting for the decisions in *Everson* and *McCollum* (*supra*): use of public school classrooms during regular school hours, limitation of participation to those children whose parents consent and, in addition, being led by a teacher or by a person designated by the teacher. Under such announced purpose and method of performance, it cannot be less than instruction contrary to the establishment and freedom clauses, nor can the requirement be excused on the theory that the saying of the prayer—although conducted in the presence of the student body in the assembly hall of the classroom—is nonetheless a voluntary act, since no child is 'required or encouraged to join in said prayer against his or her wishes' (Answering Affidavit), or on the theory that during the saying the child may re-

main silent, leave the room or report late. This is no answer, for it contains the very elements the prayer is supposed to eliminate: divisiveness, a type of compulsion, exerting as it does a pressure which an immature child is unable to resist because of his inherent desire to conform, and constituting a subtle interference by the State with the religious freedom guaranteed by the First Amendment. As Mr. Justice FRANKFURTER so aptly phrased it: 'Separation means separation, not something less * * *. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart' (*McCollum, supra*, p. 231).

"The inculcation of religion is a matter for the family and the church. In sponsoring a religious program, the State enters a field which it has been thought best to leave to the church alone. However salutary the underlying purpose of the requirement may be, it nonetheless gives to the State a direct supervision and influence that overstep the line marking the division between church and State and cannot help but lead to a gradual erosion of the mighty bulwark erected by the First Amendment. This does not mean that the State is or should be hostile to religion—merely that the State should not invade an area where the constitutionally protected freedom is absolute and not open to the vicissitudes of legislative or judicial balancing" (10 N. Y. 2d 189, 191).

That the decision of the District Court is contrary to such previous decisions of the High Court is further highlighted by the fact that the District Court found it necessary to concede to the School Board the power to make "reasonable rules and regulations" under which such "voluntary" prayers are to be held, so as to accommodate such prayers to the School Board's "power and obligation to conduct its affairs, including programming of classes and maintenance of discipline" (224 F. Supp. at 760). Thus, the decision of

the District Court is strictly contrary to *Engel* (370 U. S. at 435):

> "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing *or sanctioning official prayers* * * *".

The "reasonable rules and regulations", which the District Court's decision below specifically invites and authorizes, are clearly a "sanctioning" of a "particular form of prayer which [thus] is to be used as an official prayer in carrying on [such] program of governmentally sponsored religious activity" (370 U. S. at 430).

And yet:

> "Under that [first] Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, *government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer* which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity" (Emphasis supplied). (370 U. S. at 430).

Nor has *Pierce* (268 U. S. 510) anything to do with the cause at bar. The decision there struck down a state prohibition against attendance of school age children at private and parochial schools. The decision neither states nor implies that parents have the "right", first having chosen the public schools for the attendance of their children, then in addition also to determine the program of the public schools in accordance with their own religious convictions. If the parents select the public schools, the children are subject to all the constitutional limitations of such schools. In our pluralistic society any other arrangement would obviously lead to chaos and would be subject

to the same constitutional infirmities as lead to the decisions in *Engel* and *Schempp* and *Murray*. There is no conflict among any of these decisions.

It is realized, of course, that while the Court of Appeals did not actually and expressly state that the Establishment Clause of the First Amendment prohibits New York from permitting these so-called "voluntary" prayers—nor did it, of course, state, as petitioners allege, that the First Amendment does not prohibit them—the implication is clear that that is, as it must be, the rationale of its decision.

It is respectfully submitted that the decision of the District Court had to be reversed as being in complete conflict with the pertinent previous decisions of this Court.

It is further submitted that since the Court of Appeals based its decision entirely on previous decisions of this Court which clearly establish the rules and rationale for governmental action in this delicate field, there is no need for granting this writ and the petition therefore should be denied.

POINT II

The District Court could have been reversed because on the previous decisions of this Court, it was without jurisdiction over the subject matter.

The only allegations of the amended complaint which can be considered, at least by implication, to address themselves to the issue of jurisdiction of the District Court over the subject matter, are paragraphs 16, 19 and 20.

Paragraph 16 alleges that the said prohibition violates the Free Exercise Clause and the Free Speech Clause of the First Amendment of the United States Constitution as

made applicable to the States by the Fourteenth Amendment.

Paragraphs 19 and 20 allege that a non-discretionary duty to allow voluntary prayers in the public schools is imposed upon the defendants by the Constitution of the United States.

It must be noted at the outset that there is an absolute absence of any allegation of ultimate fact to support the completely conclusory allegation of the "voluntary" nature of these prayers; there are no allegations that, before the principal's order to discontinue, the kindergarten prayers in question were selected by the little children themselves; that the children themselves decided upon the precise moment when they wanted to say them; that they agreed that one of them would lead them off or else agree on some other method of actually arriving at a single prayer, said out loud and in unison at a specific time; that they asked the teacher to allow them to take time from the secular program of instruction; that the teacher agreed to do so; as to just what the role of the teacher was in this procedure.

If there is anything "amorphous" (to use petitioners' phraseology) about this case, it is the complete and abysmal darkness in which the amended complaint leaves the reader as to what the actual facts of the case are, on which facts after all, the entire case must stand or fall.

The following quotation is applicable here:

> "The prerequisites of the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. *He must allege in his pleading the facts essen-*

tial to show jurisdiction. If he fails to make the necessary allegations he has no standing." (Emphasis supplied.)

McNutt v. *General Motors, etc. Corp.*, 298 U. S. 178 at 189.

To the same effect see the following decisions and cases cited therein:

American Distilling Co. v. *City of Sausalito*, 73 F. Sup. 520;

Troy Laundry Co. v. *Lockwood*, 63 F. Sup. 384;

Buck v. *Case*, 24 F. Sup. 541 (Reversed on procedural grounds 307 U. S. 95).

Diversity of citizenship is not here involved; nor does the amended complaint contain any allegation of a monetary loss to the petitioners either individually or collectively, exceeding the sum or value of ten thousand dollars (28 U. S. C. §§ 1331, 1332).

Consequently, in order for the District Court to acquire jurisdiction of the subject matter of the amended complaint, petitioners would have been required in their pleading to allege facts essential to show *jurisdiction under subdivision 3 of Title 28 U. S. C. Section 1343 or Title 42 U. S. C. Section 1983.*

For this purpose petitioners would have needed to show deprivation under color of any State law, statute, ordinance, regulation, custom or usage, by the respondents, the Board of Regents of the University of the State of New York, of any right, privilege or immunity secured to the petitioners by the Constitution of the United States.

In order to utilize this basis for jurisdiction of the District Court over the subject matter of the amended complaint, it would be necessary that the United States *Con-*

stitution secure to the petitioners the right or privilege to use the public schools and the public school time for the purpose of religious exercises.

In determining jurisdiction here, however, the finding of a substantial Federal question is completely foreclosed by the decisions of this Court in *Engel* v. *Vitale*, 370 U. S. 421, and the *Schempp* and *Murray* cases, 374 U. S. 203.

Particularly, this Court in the *Engel* case stated its position that "each separate government in this country should stay out of the business of writing *or sanctioning* official prayers" (370 U. S. at 435).

The argument that voluntary prayers would take such practices out of the category of the impermissible was rejected specifically in the same case at page 430:

> "Neither the fact that the prayer may be denominationally neutral, *nor the fact that its observance on the part of the students is voluntary* can serve to free it from the limitations of the Establishment Clause." (Emphasis supplied.)

It is obvious, therefore, that this provision of the Code cannot be a sufficient basis to establish jurisdiction of the District Court over the subject matter.

> "The question of jurisdiction [other than questions relating to diversity of citizenship which is not here involved] * * * is to be determined by the allegations of the bill, and not upon the facts as they may turn out, or by a decision of the merits * * *. If the * * * complaint sets forth *a substantial claim*, a case is presented within the federal jurisdiction * * *. But jurisdiction * * * is wanting where the claim set forth in the pleading is *plainly unsubstantial*, * * *. And the federal question averred may be *plainly unsubstantial* either because obviously without merit, or *'because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the sub-*

ject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" (Emphasis supplied.)

Levering and Garrigues Co. v. *Morrin,* 289 U. S. 103, 105 (and the numerous cases cited therein);

"When a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a federal question."

Kansas v. *Bradley,* 26 Fed. 289, 290.

See also:

Hannis Distilling Co. v. *Baltimore,* 216 U. S. 285, 288;
McGilvra v. *Ross,* 215 U. S. 70, 76-77, 80;
Norton v. *Whiteside,* 239 U. S. 144, 153;
Bianchi v. *Morales,* 262 U. S. 170;
Harris v. *Rosenberger,* 145 Fed. 449, 452;
Gilstrap et al. v. *Standard Oil Company et al.,* 108 F. 2d 736; certiorari denied 311 U. S. 661;
Water Service Company v. *Redding,* 304 U. S. 252.

It must be kept in mind that what is sought here is an order directing the School Board "to afford the plaintiffs an opportunity to express their love and affection to Almighty God each day through a prayer, voluntarily offered in their respective classrooms."

In fact, the decision of the District Court necessarily concedes the "right" of the School Board to make rules and regulations about the manner of affording such opportunity, *i. e.* of "sanctioning" (*cf.* 370 U. S. at 435) such a prayer, which thus obviously becomes an official prayer.

It might be noted parenthetically that the District Court quotes the following language from *Engel* (370 U. S. 430-431):

> "Neither the fact that the prayer may be denominationally neutral, *nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause* * * *." (Emphasis supplied.)

In any event, it must be kept in mind here, that there can be no doubt that these kindergarten children, as a matter of indisputable fact, are actually incapable of saying these prayers, in unison, *without the instruction, direction and order of the teacher,* especially when they come, as the District Court found, from vastly divergent religious backgrounds ("These plaintiffs are members of Protestant, Roman Catholic, Jewish, Armenian Apostolic and Episcopalian faiths". 224 F. Supp. at 758).

Quite apart, of course, from the tender age of the petitioners herein were involved in the kindergarten prayer, the same principles are applicable to pupils of any age and grade. The basic vice of petitioners' position is that the school must actively *"sanction"* (370 U. S. 435) and *regulate* such "voluntary" prayer to make it possible.

It is thus obvious that orders, and rules and regulations of a branch of State Government are required to accomplish the purpose sought, which orders, and rules and regulations necessarily place these procedures into the same category as the procedures declared impermissible in the ENGEL *and* SCHEMPP *and* MURRAY *cases.*

It is true, of course, that the Court of Appeals expressly disagreed with respondents on this point, relying on *Bell* v. *Hood,* 327 U. S. 678. That case, however, is clearly distinguishable from the cause at bar.

In *Bell,* F. B. I. agents violated constitutional rights (see statement of Court of Appeals in that case, "that * * * [if allegations are correct] the plaintiffs' legal rights have

been ruthlessly violated"). The question there turned on availability of monetary damages under Federal law under such circumstances. Here there is no such procedural question involved and the existence of claimed "rights" has already adversely been decided by this Court.

Here we are dealing with amorphous and conclusory allegations of "voluntary" prayer, based on no allegations of ultimate facts to support such conclusory allegations.

Jurisdiction in such a case could be found only where the Constitution clearly grants public school pupils the "right" to pray in the public schools under conditions which obviously require participation of the school authorities—but previous decisions of this Court clearly foreclose any possibility of such a finding.

It is therefore submitted that the finding of a substantial Federal question in the cause at bar could well have been found to be completely foreclosed by previous decisions of this Court; consequently, it could well have been found that the District Court had no jurisdiction over the subject matter and this could well have been an additional basis for the actual reversal by the Court of Appeals; and since this additional possible ground for reversal is based on previous decisions of this Court, this is an additional basis for denying the writ.

POINT III

The District Court could have been expressly reversed for failure of the amended complaint to set forth a claim supporting relief.

It appears here to a certainty that petitioners would not be entitled to any relief under any state of facts which could be proved by them under the amended complaint,

construed in the light most favorable to them and with all doubts resolved in their favor.

Welcher v. *U. S.*, 14 F. R. D. 235;
Halliburton Company et al. v. *Norton Drilling Company*, 302 F. 2d 431.

The sole claim which petitioners seem to make as to why the issues in the amended complaint are in any manner different from those heard and decided by this Court in the cases of *Engel* v. *Vitale*, 370 U. S. 421, and *Schempp* and *Murray*, 374 U. S. 203, is the language of the allegation which states: "even where the opportunity to pray is sought by the students themselves."

New York State Law vests the Board of Education with the most broad and sweeping powers over all affairs of the schools under its jurisdiction (see New York State Education Law, Section 2554, subdivisions 1, 11 and 13; and by devolution through subdivision 1 of the same section, Section 1709, subdivisions 1, 2, 3, 13 and 33).

Because of these broad powers and duties, the said Board of Education is responsible for compliance with State and Federal laws, statutory or decisional, in all actions and procedures used or had in the public schools under its jurisdiction.

To "allow" students to spend the comparatively limited time during which they are required to attend classes in any manner based upon their own desires, rather than on rules and regulations of the Board of Education, the Superintendent, or principals and teachers, *would be to invite chaos.*

It is apodictic that the entire program of the school for each and every minute of the school day is entirely under the control and direction of the Board of Education,

which may delegate various determinations in this respect to subordinates, such as the superintendent, principals or teachers.

The Board of Regents of the University of the State of New York, pursuant to Education Law, Section 207, is charged with legislative functions concerning the educational system of the State, and the function of determining educational policies. The Board of Regents, except as to the judicial function of the Commissioner of Education, is responsible for the establishment of rules carrying into effect the laws and policies of the State relating to education.

All respondents are thus charged by law with the enforcement of all general and special laws relating to the educational system of the State, within their respective spheres, and the action taken by each and every one of them merely carried out their duties under the United States Constitution as expounded by this Court in the *Engel* and *Schempp* decisions.

The attempt to distinguish the "facts", implied rather than alleged in the amended complaint, from the facts of the cases decided by this Court *is purely an exercise in semantics.*

The argument that the voluntary nature of participation by students in any prayer removes such procedure from the category of the impermissible was made in *Engel* (*supra*) and was rejected by the Court in the following words:

> "Neither the fact that the prayer may be denominationally neutral, *nor the fact that its observance on the part of the students is voluntary* can serve to free it from the limitations of the Establishment Clause" (Emphasis supplied.) (p. 430).

And again at page 435:

> "It is neither sacrilegious nor antireligious to say that *each separate government in this country should stay out of the business of writing or sanctioning official prayers* and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance" (Emphasis supplied).

In the more recent case, the Court said:

> "Finally we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs. Such a contention was effectively answered by Mr. Justice JACKSON for the Court in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943):
>
> > 'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to * * * freedom of worship * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no election' " (374 U. S. page 225).

Petitioners' attempt to base their case on the Free Exercise Clause of the First Amendment, but in doing so they completely disregard the Establishment Clause thereof. In the *Schempp* and *Murray* cases, the relationship between these two parts of our constitutional safeguards of religious freedom are discussed in great detail, and such discussion clearly shows that the amended complaint herein utterly fails to state a claim supporting relief.

Mr. Justice BRENNAN's concurring opinion is apposite here:

> "The Framers did not entrust the liberty of religious beliefs to either clause alone. The Free Exercise Clause 'was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith.' *McGowan* v. *Maryland*, *supra*, at 464 (opinion of FRANKFURTER, J.)" (374 U. S. page 256).

And again in the majority opinion:

> "The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion *while the Establishment Clause violation need not be so attended*" (Emphasis supplied.) (374 U. S. page 223).

The majority opinion quotes from the *Everson* case (330 U. S. 1—the language of Mr. Justice RUTLEDGE speaking for the four dissenters):

> "'Our constitutional policy * * * [D]oes not deny the value or necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does *deny that the state can undertake or sustain them in any form or degree.* For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the two-fold protection and, as the state cannot forbid, neither can it perform *or aid in performing the religious function.* The dual prohibition makes that function altogether private.' *Id.*, at 52" (Emphasis supplied.) (374 U. S. page 218).

Further, the following language from *Schempp* is here apposite:

> "Second, this Court has rejected unequivocally the contention that the establishment clause forbids only governmental preference to one religion over another. Almost 20 years ago in *Everson*, *supra*, the Court said that '[n]either a state nor the Federal government can set up a church. Neither can pass laws which

aid one religion, *aid all religions*, or prefer one religion over another.' And Mr. Justice JACKSON, dissenting, agreed:

> 'There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take *every form of propagation of religion* out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense * * *. This freedom was first in the Bill or Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength as it rigidity.' *Id.*, at 26.

"Further, Mr. Justice RUTLEDGE, joined by Justices FRANKFURTER, JACKSON and BURTON, declared:

> 'The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the Colonies. Necessarily it was *to uproot all such relationships*. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.' *Id.*, at 31-32.

"The same conclusion has been firmly maintained ever since that time, see *Illinois ex rel. McCollum, supra*, at pp. 210-211; *McGowan* v. *Maryland, supra*, at 442-443; *Torcaso* v. *Watkins, supra*, at 492-493, 495, and we reaffirm it now." (Emphasis supplied.) (347 U. S., page 216).

The Court in *Schempp* quotes from *Engel* as follows:

> "'Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether

those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' *Id.*, at 430-431" (374 U. S., page 221).

In sum, the two decisions of this Court referred to above clearly show that no school child has any constitutionally secured right to perform religious exercises on school grounds and during school time, as contended for here by petitioners. For the Board of Regents, the Board of Education, the Superintendent of Schools, or a principal or teacher to permit or, in the language of this Court in *Engel* to *"sanction"* such a procedure would clearly violate the Establishment Clause of the First Amendment of the United States Constitution.

It should also be noted that all the programs at issue in the *Engel* case and the *Schempp* case, as well as in *McCollum* (333 U. S. 203) were voluntary programs. Nobody was compelled to participate in any of these programs, and yet this Court struck them down.

It is submitted that permissible procedures in this direction are limited to the released time program which is in existence in many schools of the State of New York and is, in fact, grounded in State law. Such released time program was upheld by the United States Supreme Court in *Zorach* v. *Clauson*, 343 U. S. 306. One other procedure is also permissible in this general area and it was pointed out by Mr. Justice BRENNAN in his concurring opinion in *Schempp and Murray*. It is the establishment by the school authorities, if they wish to do so, of a "moment of reverent

silence" (374 U. S. at 281). The use of this procedure is referred to in detail in two judicial decisions of the New York State Commissioner of Education (who has judicial powers over the State school system under State law). These two decisions (*Matter of Rubinstein*, 2 Ed. Dept. Rep. 299, and *Matter of Worthing*, 3 *id.* 7, are reproduced in full in the Appendix to our brief below pp. A12 and A19 (see also Point IV, below).

The contention of petitioners that the respondents' action also violates the constitutional guarantee of freedom of speech, was acknowledged by District Court as one of the issues, but the said Court wasted no further time on such contention.

The Court of Appeals on the other hand properly rejected this argument completely, based on the decision of this Court in *Poulos v. New Hampshire*, 345 U. S. 395, 405:

> "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. It is a *non sequitur* to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary."

Such a contention cannot be anything but frivolous. It was hardly the intent of the Framers (quite apart from the State-Church aspect of the matter) to guarantee to kindergartners the right to speak in school and during school hours on any subject of their own choosing, out loud and in unison! Nor, of course, can there be any doubt that these children are, as a matter of fact, *incapable of performing such a feat without the instruction, guidance and direction of the teacher*, which fact alone necessarily

eliminates the Freedom of Speech guarantee from any consideration in this matter. The same principle, of course, applies to any age or grade of pupils, because the school program cannot be left to the whims of pupils as to what they will do, discuss or speak about at any time. Any contrary holding would effectively terminate all organized instructional programs.

Thus, it is respectfully submitted that the decision of the Court of Appeals was correct for this reason also.

Thus, further, since this Court has already established the basic principles, it is obvious that this additional ground on which the decision of the Court of Appeals could have been expressly based shows that no writ is needed and the petition should be denied for this reason also.

POINT IV

For all the foregoing reasons the petition for writ of certiorari should be denied.

Since there are at least two other grounds on which the decision of the District Court herein could have been reversed, in addition to the ground actually and expressly used by the Court of Appeals *and since all three of these grounds are based entirely on consistent previous decisions of this Court,* there is obviously no need to review the decision of the Court of Appeals.

The matter of prayer in the public schools has been exhaustively treated by this Court in *McCollum, Engel* and *Schempp* and *Murray* and it is time to lay this matter to rest.

The scheme here semantically sought by petitioners is subject to exactly the same constitutional infirmities as the

schemes found impermissible in the three decisions referred to, and for exactly the same reasons. The very order of the District Court clearly indicates that such scheme cannot work without the active participation, the "sanctioning" of the appropriate levels of government.

As this Court has pointed out repeatedly, the training of our youth in matters of religion belongs in the homes and churches and does not belong in the public schools.

It is our homes and churches and synagogues which are charged with the responsibility for carrying on the religious heritage of our country.

There are a number of ways in which religious training through home and school can properly be supplemented in the public schools and without violating constitutional principles.

Among these are the "released time" program (*Zorach* v. *Clauson*, 343 U. S. 306); the daily recitation of the Pledge of Allegiance including the words "under God", under statutory mandate in the State of New York (14 N. Y. 2d 867,* certiorari denied 379 U. S. 923); "moments of reverent silence" (374 U. S. at 281), as supplemented by the two judicial decisions of the Commissioner of Education in *Matters of Rubinstein*, 2 Ed. Dept. Reps. 299 and *Worthing*, 3 *id.* 7, which are reproduced in full in the Appendix to our brief below (pages A-12 and A-19); appropriate prayers, such as invocation and benediction and others at "patriotic and ceremonial occasions" (370 U. S. 435, fn. 21); as well as teaching about religion which, as the Commissioner of Education of the State of New York has pointed out is clearly a necessary part of any course in social studies. All of these are acknowledgements of the fact that "ours is a religious nation" (143 U. S. at 470), are constitutionally

* *Lewis* v. *Allen*.

permissible and have been so declared by this Court. These, however, represent the boundary of the constitutionally permissible.

The writ, it is respectfully submitted, should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

October 19, 1965.

Respectfully submitted,

CHARLES A. BRIND
Attorney for Respondents,
Board of Regents of the
University of the State of New York
State Education Building
Albany, New York 12224

JOHN P. JEHU
ELIZABETH M. EASTMAN
LOUIS H. J. WELCH
of Counsel